become indefinitely prolonged if evidence could be produced at any time and admitted by the appellate court without there being any real justification for it or interests of justice requiring it.

The case of *Dashwood*[4] was another case in which evidence of insanity was sought to be introduced at the appellate stage. Humphreys J. in this case said:

"It is the view of the appellant's counsel that he would have been well advised to raise the question of the appellant's sanity at the trial, but it was the express desire, and indeed the avowed determination, of the appellant that no such issue should be raised. This is, therefore, not a case in which some new evidence has come to light which was never dreamt of in the course of the trial. This is, in effect, an application that the court should substitute itself for the jury as a tribunal of fact and try the case anew on a new issue and on new pleas which were never before the jury. This court has no power to order a new trial and, dealing with the present case, it would indeed require some very remarkable circumstances to justify the court in turning itself into a tribunal of fact to decide such an important matter, when that matter was deliberately withheld from the consideration of the jury by the person who is now asking the court to embark on the inquiry.....

It is impossible for the court to say that the mere fact that the appellant differed from his counsel as to the best line to be taken for his defence is sufficient to prove that he was, on that date, owing to his insanity, incapable of conducting his own defence. One of the matters which this court has to consider is the probable result, of creating a precedent, if this application were granted. In our opinion, the result would be to open the door to every person charged with a serious crime to instruct his counsel to put forward such defence as he thought right before the jury, and, if that failed, to come to this court and ask that there should be an inquiry into his state of mind, so that the Court might be induced to say that the proper verdict should have been guilty but insane. We decline to accede to this course. Indeed, in our view, we have no power to enter on any such inquiry."

No fresh evidence has come to light which could not be said to be available at the time of the trial of the appellant. The appellant conducted his defence very well and there is no evidence before me that he was legally insane.

Additional evidence is allowed when additional facts have come to light since the date of the trial. There is no such allegation in the affidavits filed in support of the appellant's application. (See the case of *Pitchforth*[5]). In the case of *Herbert Collins*[6] Lord Goddard said:

"The danger of allowing further evidence to be called after conviction, and the reason why the court does not allow it save in exceptional circumstances, is clear enough. It is very easy after a person has been convicted to find witnesses who are willing to come forward and say this, that, or the other thing. If further evidence were allowed in such circumstances, it could always be said: 'If this evidence had been given at the trial, it does not follow that the jury would have convicted or they might not have convicted.' That is especially true in cases where the defence is an *alibi*. Two or three witnesses perhaps are called to establish an *alibi*, which the jury reject. It is very often not difficult after conviction to find another witness or perhaps two or more witnesses who would be willing to come and support the *alibi* and it can always, be said: 'If only the prisoner had had the evidence of A or B which is now tendered, the jury might have come to a different decision, and the prisoner should have the benefit of that possibility.' That is one of the reasons why this court is necessarily reluctant to allow further evidence to be called after conviction."

The plea of insanity is sought to be set up but there is no suggestion in the supporting affidavits of any medical opinion having been sought or what the results of the observations of the police were when he was taken to the General Hospital, Malacca in 1963 or 1970. In the circumstances the application is dismissed.

Application dismissed.

Solicitors: *Bashir & Co.*

RE GRAHAM STARFORTH HILL

[O.C.J. (Mohamed Azmi J.) September 14, 1971]

[Kuala Lumpur — Originating Motion No. 36 of 1971]

Advocates and Solicitors — Admission — Ad hoc — Special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia for the purpose of particular case — Advocates and Solicitors Ordinance, 1947, s. 8A(2)(a).

This was an application to enable Mr. G. S. Hill to be admitted as an advocate and solicitor of the High Court in Malaya for the purpose of appearing as leading counsel in an income tax appeal case before the Special Commissioners of Income Tax.

It was alleged that Mr. Hill had special qualifications in income tax law and because he had been handling the case as a solicitor from the beginning, his qualifications and experience in the particular income tax appeal was of a nature not available in Malaysia.

Held: (1) on the evidence the applicant had not shown that he had special qualifications in income tax law;

(2) even assuming that the applicant had special qualifications or experience for the purpose of the particular case, the proceedings before the Special Commissioners of Income Tax for which the applicant was briefed is one which can be quite competently handled by an advocate and solicitor of Malaysia.

Observations on the distinction between "special knowledge" and "special qualification".

Cases referred to:-

(1) *Re S. K. Lee* [1971] 2 M.L.J. 40.

(2) *Re Michael John Mustill* [1971] 1 M.L.J. 175.

ORIGINATING MOTION.

Ronald T. S. Khoo for the petitioner.

K. A. Menon for the Bar Council.

Shiv Charan Singh (Senior Federal Counsel) for the Attorney-General.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an application by originating motion under section 8A of the Advocates and Solicitors Ordinance, 1947 to enable Mr. Graham Starforth Hill to be admitted as an advocate and solicitor of the High Court in Malaya, for the purpose of appearing as leading counsel for a certain company in an income tax appeal case which is to be heard before the Special Commissioners of Income Tax from September 20 to September 25, 1971. The applicant is neither a Malaysian nor is he normally resident in Malaya. The application is supported by an affidavit affirmed by Mr. Ronald T. S. Khoo, a partner in Shearn, Dela-

more & Company, who are the present solicitors for the company, and he is also appearing as counsel for the applicant in the present proceedings.

Section 8A(2) of the Advocates and Solicitors Ordinance provides:

"No person shall be admitted to practise as an advocate and solicitor under sub-section (1) unless —

(a) for the purpose of that particular case he has, in the opinion of the Court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and

(b) he has been instructed by an advocate and solicitor in Malaysia."

In this case, it is not in dispute that the applicant has satisfied the requirement of paragraph (b) of sub-section (2). The only relevant issue to be decided, therefore, is whether on the evidence before the court as contained in the affidavit affirmed by Mr. Ronald T. S. Khoo, the applicant has satisfied the requirement of paragraph (a) of the said sub-section. In my view, for the application to succeed, the onus is on the applicant to satisfy the court not only that for the purpose of that particular case the applicant has special qualifications or experience but also that such special qualifications or experience must be of a nature not available amongst advocates and solicitors in Malaysia.

On the question of what constitutes "special qualification", Sharma J. had this to say in *Re S. K. Lee*: [1]

"The word 'qualification' used in section 8A(2)(a) denotes an accomplishment or a quality and the adjective 'special' qualifying it indicates that the accomplishment contemplated should be of an exceptional degree or such that excels in some way the measure of accomplishments reached by the advocates and solicitors of Malaysia. As I read sub-section (2)(a) the applicant should be such a person who, as a lawyer and on the evidence before the court, exhibits distinguished qualities or is devoted to a particular branch or field of law. Instances would be of persons who specialise, for example, in income tax law, or trade marks, divorce practice, shipping law, etc. and have achieved such heights in the exercise of their profession that they stand out as great luminaries in the firmament of law. The list of such examples can by no means be exhaustive. It all depends upon the particular qualifications a particular lawyer has or the particular subject to which he has devoted himself. There may be, for example, instances where a lawyer exclusively practises before the highest courts of the land, or the highest appellate courts of the various countries of the Commonwealth or other lands where the law is similar to our own."

In *Re Michael John Mustill*,[2] an application for *ad hoc* admission was made to enable the applicant to appear as counsel in a civil case involving substantial questions of law relating principally to marine insurance and charterparties. In allowing the application, Yong J. found that experts or specialists in such a branch of the law were not available in Malaysia. As for special qualification of the applicant, his Lordship had this to say:

"... the petitioner had for the past fifteen years been actively engaged in the practice of commercial law in the English Bar and that he is an expert in the field of marine insurance and charterparties. He is a joint editor (with Mr. Justice McNair and Mr. Justice Donaldson) of the chapter dealing with marine insurance in the *Halsbury's* Laws of England. He is also the joint editor (with Mr. Justice McNair and Mr. Justice Mocatta) of the current edition of the treatise entitled *Scrutton* on Charterparties'."

Now, what are the special qualifications or experience of the applicant in the income tax appeal? The most relevant part concerning his qualifications and experience are set out in paragraphs 13, 14 and 16 of the supporting affidavit. Paragraph 13 refers to his qualifications in general which are not uncommon to some local advocates and solicitors. Paragraph 14 states:

"A substantial part of the work of the petitioner has been to do with the revenue law both contentious and non-contentious. The petitioner has dealt with revenue matters on behalf of the Comptroller of Inland Revenue of Singapore during the 3 years which he spent as Crown Counsel from 1953 to 1956 and from 1956 until the present day he has appeared both for the comptroller and for tax payers in a considerable number of tax appeals to the board of revenue and to the High Court and the Court of Appeal in Singapore. Your petitioner has advised and represented the Comptroller of Income Tax in Kuala Lumpur and appeared in the courts of West and East Malaysia in tax appeals."

With the greatest of respect, the mere fact that a legal practitioner has dealt with revenue matters on behalf of the Comptroller of Inland Revenue of Singapore, and has advised and represented the Comptroller of Income Tax in Kuala Lumpur, and has appeared in the courts in tax appeals in both countries, although admittedly it is an achievement which any lawyer should be proud of, does not make him an expert or a specialist in income tax law so as to make his qualifications "special". Indeed, on the evidence before me, as a lawyer, the applicant is not specialising in income tax law but only a substantial part of his work is connected with revenue law. Nor is there sufficient evidence that the applicant is devoted to the particular branch of the law to which the case relates as was the case in *Re Michael John Mustill*. This does not of course mean that the applicant is not a good revenue lawyer, but, as stated earlier, what is relevant in this case is for the applicant to satisfy the court that he has special qualifications or experience within the meaning of section 8A(2)(a) of the Ordinance.

It is further argued on behalf of the applicant that, because he has been handling the case as a solicitor from the very beginning, his qualifications and experience in this particular income tax appeal is of a nature not available locally. Thus, paragraph 16 of the supporting affidavit states:

"Further the personal involvement of your petitioner on behalf of the appellant in P.K.R. 129/9 up to the time of the notice of appeal against assessment gives the petitioner special knowledge of the facts concerning the case."

It may be true that the applicant was the solicitor of the appellant company and considerable assistance has been obtained from the applicant in the conduct of the appeal by Messrs. Shearn, Delamore & Company, the present solicitors, and as such he has special knowledge of the facts of the case and had it not been for the amendment to the Advocates and Solicitors Ordinance, he would as a matter of course have appeared as counsel in the appeal without the necessity of filing the present application. Counsel for the applicant further submitted that a transitional period should be given for cases of this nature where a foreign lawyer is caught by the provision of the amendment. To my mind, special knowledge is not synonymous with special qualification. In my view, the words "special qualifications or experience" refer to the particular branch of the law as a whole to which the relevant case relates

rather than to the facts of the case or to a particular statute or certain provisions of that statute to which the case may relate. The mere fact that a person from abroad has been retained as counsel or solicitor and given instructions by a litigant or has given legal opinion in a case whether prior to or after the coming into force of the amendment to the Advocates and Solicitors Ordinance, is insufficient to clothe him with special qualifications or experience for the purpose of that particular case. Unless this interpretation is adhered to, we might find every foreign practitioner had to be admitted under section 8A merely because a litigant in this country had retained him or had sought legal opinion from him in a particular case, and thereby make a hole in the provisions of the Ordinance through which could be driven an articulated vehicle.

As regards the transitional period, the short answer to this argument is that the Ordinance as amended does not provide for transitional provisions. In any event, the applicant could not be said to have been caught by surprise by the act of the legislature. The amendment was first published in the *Gazette* on April 16, 1970 to take effect from October 1, 1970, but for some reason, the date of coming into force was postponed to January 1, 1971. (See *Gazette* Notification No. P.U.(A) 234 dated July 9, 1970). There was, therefore, sufficient notice for the applicant to dissociate himself from the case in question.

Assuming for a moment that the applicant has special qualifications or experience for the purpose of this particular case, the next issue to be determined is whether such qualification or experience is of a nature not available amongst local advocates and solicitors. For the determination of this particular issue, it is necessary to consider the nature and type of the case in which the applicant wishes to appear as senior counsel for the appellant company. It is common ground that the company is aggrieved by the decision of the Comptroller of Income Tax as regards the assessment to tax for the years 1966 and 1967, and has appealed to the Special Commissioners of Income Tax. From paragraphs 3 to 8 of the affidavit of Mr. Ronald T. S. Khoo, the appeal involves interpretation of certain provisions of the income tax law in this country; the main issue being whether the company's assessments for the relevant years are governed by the cessation provisions of the Income Tax Ordinance, 1947 or by the provisions of paragraph 104(b) of the transitional and savings provisions embodied in Schedule 9 of the Income Tax Act, 1967. Having regard to the facts disclosed in the affidavit, I am unable to agree that the case involves issues of such legal complexity that it requires a counsel who is an expert or specialist in income tax law to handle it. I am, therefore, in complete agreement with one of the grounds of objection raised by the Attorney-General and the Bar Council in their notice of objection that the proceedings before the Special Commissioners of Income Tax for which the applicant is briefed is one which can quite competently be handled by an advocate and solicitor of Malaysia.

Having regard to all the relevant factors in this case, I find the facts as set out in the supporting affidavit fall short of the requirement of section 8A(2)(a) of the Advocates and Solicitors Ordinance. The applicant has failed to satisfy me that for the purpose of that income tax appeal he has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia.

The application is accordingly dismissed.

Application dismissed.

Solicitors: *Shearn, Delamore & Co.*

FAN YEW TENG v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Ong C.J. (Malaya), Suffian, Ali and Ong, F.JJ.) September 16, 1971]

[Kuala Lumpur — Federal Court Criminal Appeal No. 7 of 1971]

Criminal Law and Procedure — Trial — Case transferred from sessions court to High Court — No preliminary inquiry held — Whether trial before High Court a nullity — Criminal Procedure Code (F.M.S. Cap. 6), ss. 183, 177 and 417.

In this case the appellant had been originally charged before the president, sessions court under section 4(1)(c) of the Sedition Act. He applied to a judge for the transfer of his trial to the High Court and the High Court made the order prayed for. He was subsequently tried before the High Court and was convicted and sentenced *(Sub nom. Public Prosecutor* v. *Ooi Kee Saik & Ors.* [1971] 2 M.L.J. 108). On appeal it was argued *inter alia,* that the trial before the High Court was a nullity as the appellant had not been committed for trial after a preliminary inquiry as required by section 138 of the Criminal Procedure Code.

Held (Ali F.J. dissenting): the trial in this case was held in contravention of section 138 of the Criminal Procedure Code which provides that no person shall be tried before the High Court unless he has been committed for trial after a preliminary inquiry and therefore the trial was a nullity.

Cases referred to:-

(1) *T.T. Rajah* v. *R.* [1963] M.L.J. 281.

(2) *Fung Yin Ching* v. *Public Prosecutor* [1965] 1 M.L.J. 49, F.C.

(3) *Subramania Ayyar* v. *King Emperor* I.L.R. 25 Mad. 61, 97.

(4) *Magor and St. Mellons Rural District Council* v. *Newport Corporation* [1952] A.C. 189.

FEDERAL COURT.

Dato' S. P. Seenivasagam (*D. P. Xavier* and *Sahadevan* with him) for the appellant.

Tan Sri Mohamed Salleh bin Abas (Solicitor-General) (*Gunn Chit Tuan* with him) for the respondent.

Cur. Adv. Vult.

Azmi L.P. (delivering the judgment of the majority): The appellant was convicted together with three others of having committed an offence under section 4(1)(c) of the Sedition Act 1948 (Revised — 1969) punishable under section 4(1) of the said Act. He has appealed to this court against both his conviction and sentence.